Brief prepared in Julien's hands 17-601

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~558~~. 304 96

THE UNITED STATES, APPELLANTS,

vs.

JULES LAPÈNE AND AUGUSTE FERRÉ,

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 18, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 553.

THE UNITED STATES, APPELLANTS,

vs.

JULES LAPÈNE AND AUGUSTE FERRÉ.

APPEAL FROM THE COURT OF CLAIMS.

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1 *Petition.—Filed Jan'y* 15, 1868.

United States Court of Claims.

JULES LAPÈNE AND AUGUSTE FERRÉ, DOING BUSiness under the firm-name of Lapène & Ferré,
vs.
THE UNITED STATES. } 3052.

6 C.C. 362
Brief Part C

To the honorable the judges of the Court of Claims:

The petition of Jules Lapène and Auguste Ferré, partners under the name of Lapène and Ferré, residents of the city of New Orleans, in the State of Louisiana, showeth:

That, in the month of April, 1863, your petitioners were the owners and in possession of one hundred and seventy-nine bales of upland cotton, classed as good quality, and then stored in various places in the State of Louisiana; that the said Jules Lapène is a naturalized citizen of the United States, and that the said Auguste Ferré is a citizen of France.

That, in the said month of April, 1863, after the occupation of said city of New Orleans by the United States forces, all of said cotton was seized and taken possession of by Capt. A. B. Long, and Capt. F. G. Pope, acting, as your petitioners are informed and believe, under the orders of the War Department, but without the consent of your petitioners and against their will; and that no part of said cotton, or the proceeds thereof was appropriated in any way to the use of the Army or Navy of the United States; but that said cotton or the proceeds thereof, was turned over by the officer seizing it, or his superior officer, to an agent of the Treasury Department, by whom it was sold and the nett proceeds thereof paid into the Treasury of the United States.

2 Your petitioners aver that they are unable to state the precise amount for which said cotton was sold, or the expenses attending the seizure, shipment, transportation, and sale; but they state, on information and belief, that the said cotton was sold by some agent of the Treasury Department, as follows, to wit, for forty cents per pound, the aggregate of sale being thirty-one thousand six hundred and ninety dollars, and the expenses thereof did not exceed five per cent., and the nett proceeds thereof which have been paid into the Treasury of the United States amount to thirty thousand one hundred and five dollars and fifty cents.

Your petitioners further show that said cotton had never been abandoned or forfeited, nor become liable to confiscation under any of the acts of Congress, in that behalf made and provided; and that it was not liable to seizure or capture, under the laws of nations nor under the laws and usages of war; and that no proceedings, for the purpose of condemning said cotton, have ever been instituted in any court or before any tribunal.

Your petitioners further show that if there has been a valid and lawful capture of said cotton, which they understand is asserted by the United States, they are, nevertheless, entitled to receive the nett proceeds of it, amounting to the said sum of $30,105.50, as they verily believe, under the provisions of the act of Congress, approved March 12, A. D., 1863, entitled, "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States."

Your petitioners further show that they have never in any way volun-

tarily aided, abetted, or encouraged the late rebellion against the Government and authority of the United States; but, on the contrary, they are notoriously known as having always been opposed to the late rebellion, and that one of the partners of the firm of Lapène & Ferré, Jules Lapène, did all in his power to discourage and discountenance said rebellion.

COOLEY, CLARKE & AUG. BARQ.

3 Jules Lapène, being duly sworn, deposeth and saith, that he is one the claimants named in the foregoing petition; that no assignment or transfer of said claim or any part thereof or any interest therein has been made; that they are justly entitled to the amount therein claimed from the United States, after allowing all just claims and offsets, and that he believes the facts stated in said petition to be true.

JULES LAPENE.

Subscribed and sworn to before me, this 16th day of December, A. D. 1867, and of the American independence the 92d year.

D. AUGUSTIN,
United States Commissioner for the District of Louisiana.

U. S. district court, district of Louisiana.

I certify that D. Augustin, whose genuine signature is affixed to the preceeding instrument of writing, is and was, at the time of signing the same, a duly qualified commissioner of the United States for the district of Louisiana, and that to his official acts full faith and credit are due and owing.

Witness my hand and seal of said court, at New Orleans, this 16th day of December, A. D. 1867.

CH'S CLAIBORNE, *Clerk.*

4 In the United States Court of Claims. December term, A. D. 1868.

JULES LAPÉNE AND AUGUSTE FERRÈ
vs.
THE UNITED STATES. } No. 3052.

And the said defendants, by their Attorney General, come and make answer to the petition of the claimants herein; and, not confessing the same or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimants in the sum of $30,105.50, the said defendants say that they are not indebted to the said claimants in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimants have, at all times, borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney General.

And for a further plea to the said petition the said defendants say, that the said claimants ought not to have or maintain their aforesaid action against the said defendants, because they say that the said

claimants did not, "within two years after the suppression of the late rebellion, prefer their claim to the proceeds" of the property mentioned and described, in the Court of Claims, as provided by the 3d section of the act of Congress approved March 12, 1863, and entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

T. LYLE DICKEY,
Assistant Attorney General.

And for a further plea to the said petition the said defendants say, that the said claimants ought not to have or maintain their aforesaid action against the said defendants, because they say that the said claimants, at the time of the filing of their said petition, were aliens, and that the said seizure and taking possession of the said property named in the said petition, and the said several acts and doings of the defendants, their officers, servants, and agents therein set forth were made and done in the administration of, and in virtue and under color of, the act of Congress entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," approved M'ch 12, 1863.

Whereby and by virtue of the provisions of the act of Congress entitled "An act regulating judicial proceedings in certain cases, for the protection of officers and agents of the Government, and for the better defence of the Treasury against unlawful claims," approved July 27, 1868, the claimants are barred of their said action against the defendants.

T. LYLE DICKEY,
Assistant Attorney General.

5 *Amended petition.*

United States Court of Claims. December term, 1870.

JULES LAPENE & AUGUSTE FERRÉ
vs.
THE UNITED STATES. } 3052.

And now comes the claimant, Jules Lapene, by leave of the court first had and obtained, and, by way of amendment to his petition sworn to on the 16th day of December, 1867, and heretofore filed in this cause, here avers that he has at all times borne true allegiance to the Government of the United States, and that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

JULES LAPENE.

Subscribed and sworn to before me this 8th day of February, A. D. 1871.

[SEAL COMM'R.]

K. LOEW,
U. S. Comm'r.

Filed February 13, 1871.

6 In the Court of Claims.

JULES LAPENE AND AUGUSTE FERRÉ
vs.
THE UNITED STATES. } 3052.

At a Court of Claims held at the Capitol, in the city of Washington, second of May, A. D. 1871, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimants, and do order, adjudge, and decree that the said Jules Lapene and Auguste Ferré have and recover of and from the United States the sum of thirty-four thousand three hundred and sixty-eight dollars no cents, ($34,368.00.)

By the court.

7 In the Court of Claims. December term, 1870.

JULES LAPENE AND AUGUSTE FERRÉ *vs.* THE UNITED STATES. } No. 3052.

From the judgment rendered in the above-entitled cause, on May 2, 1871, in favor of the claimants, the defendants, by their Attorney General, on this 29th day of July, 1871, make application for an allowance of an appeal to the Supreme Court of the United States, the amount in controversy exceeding three thousand dollars.

THOMAS H. TALBOT,
Ass't Att'y General.

Filed in the clerk's office July 29, 1871.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *C. J.*

8 Court of Claims.

JULES LAPENE AND AUGUSTE FERRÉ *vs.* THE UNITED STATES.

The court, upon examination and consideration of the evidence, find the following to be the facts in this case:

1. The claimant Jules Lapene is a citizen of the United States, and the claimant Auguste Ferré is a subject of the government of France.

2. At the time of the breaking out of the late rebellion the claimants were, and through the whole period of the rebellion continued to be, residents of and merchants in the city of New Orleans, Louisiana.

3. On the 20th of February, 1862, while Louisiana was in the possession and under the control of the rebels, the claimants sent their traveling clerk from New Orleans into the interior of Louisiana, viz,
9 the parishes of St. Martin and St. Landry, to collect moneys due them there, and gave him authority to purchase sugar and cotton for them.

4. In March or April, 1862, the cliamant Lapene requested one Avegno, who was then going from New Orleans to said parishes, to remit to the said clerk the sum of $4,000 or $5,000, and to assist said clerk in the business of buying sugar and cotton, which the said Avegno agreed to do, and, in pursuance of that agreement, delivered to said clerk, at New Iberia, in the parish of Iberia, then in the possession and under the control of the rebels, five thousand dollars, consisting of "bank-notes, confederate money, and shin-plasters."

5. While the said clerk and the said Avegno were in said parishes of St. Martin and St. Landry, viz, on the 27th day of April, 1862, the city of New Orleans was captured by the United States forces, and thence-

forth through the whole period of rebellion was held by those forces.

10 6. After said capture the cotton, for the proceeds of which this suit is brought, was purchased by the said clerk with the said sum of $5,000 and other moneys collected by him in the said parishes, which parishes were, when the purchases were made, in the possession and under the control of the rebels. It was purchased in nine or ten small lots and left at the places where it was purchased.

7. The said clerk returned from those parishes to New Orleans on the 14th of July, 1862. There is no evidence of any communication having been had between him and the claimants, in relation to the said purchases of cotton, between the capture of New Orleans and the clerk's return to that city, except the aforesaid delivery to him by Avegno of the said $5,000.

8. The cotton so purchased remained at the points at which it was purchased until April and May, 1863, when it was captured by

11 the United States military forces and shipped to and received by Col. S. B. Holabird, chief quartermaster of the Department of the Gulf, at New Orleans.

9. In addition to said cotton there was a large quantity of other cotton seized by the United States military forces in the parish of St. Landry, and shipped to and received by the said Holabird. Of the entire quantity so shipped to and received by him, part was sent to and sold in the city of New York, and part was sent to and sold in the city of Boston, Massachusetts, and part was sold in the city of New Orleans; but there was no evidence that any of the cotton of the claimants was sent to either New York or Boston.

10. The net proceeds of the claimants' cotton were paid into the Treasury of the United States. The average net proceeds of the cotton captured in Louisiana in April and May, 1863, and sold at New Orleans, was $192 per bale; and the average net proceeds of all the cot-

12 ton then and there captured and sold at New Orleans, New York, and Boston was $218.74 per bale.

11. The said claimants gave no aid or comfort to those engaged in rebellion against the United States, and the said claimant Lapene always bore true allegiance to the Government thereof.

12. That the government of France accords to citizens of the United States the right to prosecute claims against that government in its own courts.

Upon the foregoing facts the court announces the following conclusions of law:

1. That the cotton, for the proceeds of which this suit is brought, was the property of the claimants.

2. That it was not purchased in violation of any law prohibiting commercial intercourse between inhabitants of loyal States and in-

13 habitants of the States engaged in insurrection against the United States.

3. That the claimants are entitled to the net proceeds of said cotton.

4. That judgment should be rendered in their favor for said net proceeds, at the rate of one hundred and ninety-two dollars per bale, being in aggregate amount thirty-four thousand and three hundred and sixty-eight dollars.

By the court.

14 In the United States Court of Claims.

JULES LAPENE AND AUGUSTE FERRÉ
vs.
THE UNITED STATES. } 3052.

Being satisfied with the findings of the court in this case, we hereby withdraw the findings asked for by the claimants.

COOLEY & CLARKE,
For Claimants.

The foregoing is a true copy of the endorsement made by claimants' counsel upon their proposed findings of fact in this cause.

JOHN RANDOLPH,
Ass't Clk Court of Claims.

15 United States Court of Claims.

LAPENE & FERRÉ
vs.
THE UNITED STATES. } No. 3052.

Upon the hearing of this cause the defendants ask the court to find the following specific facts:

I. The claimant Jules Lapene is a citizen of the United States, and the claimant Auguste Ferré is a citizen and subject of the Republic of France.

II. The claimants, during the late war of the rebellion, were residents of the city of New Orleans, Louisiana, and were engaged in business as merchants in the said city.

III. The city of New Orleans was captured by the national forces engaged in the suppression of the late rebellion on the day of , 1862; and from that time till the final suppression of the rebellion was held and occupied by the said forces.

IV. The cotton, the proceeds of which are claimed in this suit, was purchased through an agent or agents of the claimants, within the lines held and occupied by the insurgent army engaged in the late rebellion, after the occupation of New Orleans by the national forces, and while the claimants were within the territory held and occupied by the national forces.

V. The agency or agencies through which the cotton was purchased was or were created after the occupation of New Orleans by the national forces, and while the claimants were within the national lines.

And the defendants further ask the court to find, in respect to the laws of the French Republic, the following facts:

1. The right to sue the French government in a French court is only derived from general principles, and is not matter of positive law.

2. The civil courts of France, as contradistinguished from criminal courts, consist of two orders of jurisdiction; one is called civil courts, another one is called administrative courts; one which culminates in what is called the cour de cassation, and the other in what is know' as conseil d'état.

3. The only tribunals in France before or in which any sort of action or proceedings can be had against the French sovereign
17 are the "tribuneaux administratifs," (administrative tribunals,) with this exception: That the Emperor may be brought into the

civil courts under article 69 of the code de procèdure civile, when it is a question of lands or eminent domain.

4. (*a.*) The action of an American citizen for indemnity due him arising out of a contract made with, or supplies furnished to, the French government, should be brought before the administrative tribunals, ("tribun'aux administratifs.") As to the administrative tribunal before which the suit should be brought, the jurisdiction varies according to the nature of the cause. It is either before the "conseils de préfecture," or before the "ministers of state," in the first instance, and always in appeal before the "conseil d'état statuant au contentieux."

(*b.*) The "contentieux administratif" exists where there is a specified claim distinctly set forth, be it just or without foundation, under cover of private right, which right it is claimed has been impaired by an act of the administration.

(*c.*) One characteristic of the litigation of the administrative
18 tribunals is, that it is always connected with the public interests in all cases, whatever be the nature of the question involved. The "jurisdiction contentieuse" has for its object the examination, the consideration, and the reparation through its decisions, of all wrongs which the voluntary jurisdiction [of the administration] has caused to private rights.

5 The jurisdiction of the "tribun'aux administratifs" extends over the following subjects only:

1st. Public domains, including encroachments, usurpations, waste of roads belonging to highways, and the encroachments and usurpations only on country roads, as well as servitudes and works of public utility.

2ond. Grants of lands belonging to the public domain made for executive departments or for executive services.

3rd. Mines, the withdrawal of the privilege of working the same, forfeiture of the grant, and other questions relating thereto.

4th. Draining swamp lands.

5th. Conventions and contracts for supplies made between the state and individuals.

6th. Ferries, boats, and leases for the right of tolls.

19 The other questions arising from the other classes of administrative cases belong to the civil courts.

7th. Petitions for the entire release or partial reduction of direct taxes.

8th. Pensions due by the State and liabilities of the same.

9th. Public accounts.

10th. Electoral validity, as far as it relates to the formation of the councils of "départements," "arondissements," and of "communes," in the violation of the rules prescribed by law to electoral assemblies.

11th. Interpretation of administrative decisions. There are also other matters which belong to the administrative jurisdiction; they have been defined respectively by laws, the details of which do not properly pertain to the above questions.

6. Parties are brought before the "tribun'aux administratifs" by service of process, as follows:

"1st. The Emperor, when it is a question of lands or eminent domain in the person, or at the residence of the prefect of the department where sits the court before which the action must be brought in the first instance.

20 "2nd. The summons, or a copy left at the office of the treasury.

"3rd. The treasury, in the person or the office of its agent. The public departments or establishments, in their offices in the places

where the seat of administration is fixed. In other places, in the person or at the office of their representatives.

"4th. The Emperor, if it is lands, in the person of the "procureur imperial d'arondissement."

7. The administrative tribunal, according to the nature of the cause, is either before the "conseils de préfecture," or before the "ministers of state." It is either before the "conseils de préfecture" or before the "ministers of state" in the first instance, and always in appeal before the "conseil d'état statuant au contentieux."

8. As to ministers of state, the reclamations which give rise to these administrative acts of a judicial nature, may be brought sometimes under the "voie [jurisdiction] gracieuse," or on application to the discretionary power of the officer, (Bioche Dist. Comp. Admin., § 1, art. 14,)

and sometimes unde the "voie (jurisdiction) contentieuse," which
21 is after the claim has assumed a positive and decided shape, and is properly submitted. (Ibid.) Application under the former jurisdiction is simply a petition addressed to the executive, to modify or retract one of its decisions. It is rejected or admitted according to the will and judgment of the head of the department, and the decision has not the effect or character of an act of jurisdiction, that is, it carries no judgment; but applications made under the latter jurisdiction result in actual judgments."

The administrative power is manifested sometimes in its regulations, and sometimes in administering the public business. In either case, its regulations or its acts may operate injuriously on private interests, which ought then to be admitted to present their claims, (réclamer,) and these claims (réclamations) are considered by the administration itself, which admits or rejects them, according as they appear to be well or ill founded. Thus the administrative functions are of two sorts. The one set consists in acts of authority as to particulars or generals, the other in considering and determining the reclamations which arise out of these acts of authority. * * * It appears then that the administration is divided

into pure administration and administration on disputed points."

22 9. As to the "conseils de préfecture," the administration of each "départ'ment," [political division of France] is organized as follows:

There is a prefect, and by him sits a "conseil de préfecture," the members of which are appointed by the executive. These "conseils de préfecture" are the competent tribunals which decide in first instance, mostly on the lawsuits which are not submitted to the civil courts; their jurisdiction has been defined by the law of February 17, (28 Pluviose, an VIII.) This law establishes the classes of reclamations which are submitted to that jurisdiction. (See fact 5.)

In cases which are decided by the "conseil de préfecture," there is almost always the possibility of appealing to the council of state.

THO'S H. TALBOT,
Ass't Att'y Gen'l.

Upon the foregoing proposed findings by the defendants the court makes the following endorsement, to wit:

All the within findings refused, because all, except that numbered V, are incorporated in the court's finding, and that numbered V is not true.

C. D. D.

(Indorsed:) 3052. Lapene & Ferré vs. The United States.

23 In the Court of Claims.

JULES LAPENE AND AUGUSTE FERRE
vs.
THE UNITED STATES. } No. 3052.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the Attorney General, for defendants, for the allowance of an appeal, as filed in the clerk's office 29 July, A. D. 1871, and of the order of the chief justice of said court allowing the same; of the findings of facts and conclusions of law thereon, on which the court founded its judgment; the withdrawal of claimants' finding; also the proposed defendants' findings.

In testimony, whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this ninth day of December, A. D. 1871.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No 553. The United States, appellants, vs. Jules Lapene & Auguste Ferre. Court of Claims. Filed 18th December, 1871.

REC. 553—2

17-601

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1873.

THE UNITED STATES, Appellants,

vs.

JULES LAPENE AND AUGUSTE FERRE, Appellees.

No. 96.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the Appellees.

W. PENN. CLARKE,
Attorney for Appellees.

WASHINGTON:
PRINTED BY POWELL & GINCK,
630, 632 F Street.
1873.

In the Supreme Court of the United States.

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THE UNITED STATES, Appellants,

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No. 96.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the Appellees.

W. PENN. CLARKE,
Attorney for Appellees.

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Supreme Court of the United States.

OCTOBER TERM, 1873.

THE UNITED STATES, *Appellants*,
vs.
JULES LAPENE AND AUGUSTE FERRE, *Appellees.*
No. 96.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLEES.

The appellees brought their action in the Court of Claims, against the United States, under the act of March 12, 1863, known as the Captured and Abandoned Property Act, to recover the net proceeds of 179 bales of Upland cotton, seized by the federal military authorities in the Parish of St. Landry, in the State of Louisiana, in the spring of 1863, which were subsequently sold, and the proceeds paid into the national Treasury. Judgment was rendered for the claimants for the sum of $34,368, being the amount of the net proceeds of said cotton found to be in the Treasury, and the defendant appeals.

The following are the facts in the case as found by the court below:

1. The claimant, Jules Lapene, is a citizen of the United States, and the claimant, Auguste Ferre, is a subject of the government of France.

2. At the time of the breaking out of the late rebellion the claimants were, and through the whole period of the

rebellion continued to be, residents of and merchants in the city of New Orleans, Louisiana.

3. On the 20th of February, 1862, while Louisiana was in the possession and under the control of the rebels, the claimants sent their traveling clerk from New Orleans into the interior of Louisiana, viz., the parishes of St. Martin and St. Landry, to collect moneys due them there, and gave him authority to purchase sugar and cotton for them.

4. In March or April, 1862, the claimant Lapene requested one Avegno, who was then going from New Orleans to said parishes, to remit to the said clerk the sum of $4,000 or $5,000, and to assist said clerk in the business of buying sugar and cotton, which the said Avegno agreed to do, and, in pursuance of that agreement, delivered to said clerk, at New Iberia, in the parish of Iberia, then in the possession and under the control of the rebels, five thousand dollars, consisting of "bank-notes, confederate money, and shin-plasters."

5. While the said clerk and the said Avegno were in said parishes of St. Martin and St Landry, viz., on the 27th day of April, 1862, the city of New Orleans was captured by the United States forces, and thenceforth through the whole period of rebellion was held by those forces.

6. After said capture the cotton, for the proceeds of which this suit is brought, was purchased by the said clerk with the said sum of $5,000 and other moneys collected by him in the said parishes, which parishes were, when the purchases were made, in the possession and under the control of the rebels. It was purchased in nine or ten small lots, and left at the places where it was purchased.

7. The said clerk returned from those parishes to New Orleans on the 14th of July, 1862. There is no evidence of any communication having been had between him and the claimants, in relation to the said purchases of cotton, between the capture of New Orleans and the clerk's return to that city, except the aforesaid delivery to him by Avegno of the said $5,000.

8. The cotton so purchased remained at the points at which it was purchased until April and May, 1863, when it was captured by the United States military forces and shipped to and received by Col. S. B. Holabird, chief quartermaster of the Department of the Gulf, at New Orleans.

9. In addition to said cotton there was a large quantity

of other cotton seized by the United States military forces in the parish of St. Landry, and shipped to and received by the said Holabird. Of the entire quantity so shipped to and received by him, part was sent to and sold in the city of New York, and part was sent to and sold in the city of Boston, Massachusetts, and part was sold in the city of New Orleans; but there was no evidence that any of the cotton of the claimants was sent to either New York or Boston.

10. The net proceeds of the claimants' cotton were paid into the Treasury of the United States. The average net proceeds of the cotton captured in Louisiana in April and May, 1863, and sold at New Orleans, was $192 per bale; and the average net proceeds of all the cotton then and there captured and sold at New Orleans, New York, and Boston was $218.74 per bale.

11. The said claimants gave no aid or comfort to those engaged in rebellion against the United States, and the said claimant Lepene always bore true allegiance to the Government thereof.

12. That the government of France accords to citizens of the United States the right to prosecute claims against that government in its own courts. Record, 4, 5.

Upon the foregoing facts, the Court announced the following conclusions of law:

1. That the cotton, for the proceeds of which this suit is brought, was the property of the claimants.

2. That it was not purchased in violation of any law prohibiting commercial intercourse between inhabitants of loyal States and inhabitants of the States engaged in insurrection against the United States.

3. That the claimants are entitled to the net proceeds of said cotton.

4. That judgment should be rendered in their favor for said net proceeds, at the rate of one hundred and ninety-two dollars per bale, being in aggregate amount thirty-four thousand and three hundred and sixty-eight dollars.

Record, 5.

It is claimed by the appellant, that the purchase of the cotton under the circumstances stated in the 3d and 4th facts found by the Court, was in violation of the non-inter-

course act, and that the Court erred in holding that it was not illegal. This is the only error assigned.

The record shows that the appellees, prior to and during the war, were merchants in the city of New Orleans, and that in February, 1862, while the whole territory of the State of Louisiana was in the possession of the rebels, they sent one of their clerks into the interior of the State, to make collections of money due them there, with authority to purchase sugar and cotton for the firm. A little later, in March or February, they forwarded to this clerk, by one Avegno, the sum of $4,000 or $5,000, and requested him to assist the clerk in making the said purchases of sugar and cotton. Avegno did pay over to the clerk of the appellees the sum of $5,000, and assisted him in buying for them the articles named. All this transpired before the capture of New Orleans, and while the whole State was rebel territory. So far, there can be no pretence that there was anything illegal in the transaction. All the parties were within the rebel lines, and, so far as appears, all were citizens or residents of the State of Louisiana. The agency thus created was *strictly legal.* It conflicted neither with the statute law, nor the laws of war; and if it ever became illegal, it became so by the subsequent events, over which the appellees and agents had no control.

On the 27th day of April, 1862, the city of New Orleans was captured by the Union forces, and remained after that date in the military possession of the United States, leaving the appellees within the Union lines, and their agents within the rebel lines; and it is claimed that this capture of the city in which the appellees resided, and the purchase of the cotton subsequent to that date, rendered illegal that which was lawful in its inception, and that consequently the title to the cotton purchased by the agents did not vest in the principals. The agents remained within the rebel lines, and the cotton was purchased within

those lines. No communication took place between the principals and their agents while thus separated. A raid of the federal forces into the Parishes of St. Martin and St. Laundry, later in 1862, brought the agent within the Union lines, and on the 14th of July in that year, he returned.

In the case of the *United States v. Anderson*, 9 Wall., 56, Justice DAVIS, delivering the unanimous opinion of the Court, says:

"This is an attempt to import from the confiscation law of July 17th, 1872, into this law, a disability which it does not contain. If this could be done, but very little benefit would accrue to the loyal people of the South from the privilege conferred on them by the law in question. It is well known that nearly all the Southern people were engaged in the rebellion, and that those who were not thus employed, furnished the exception rather than the rule. *Few as they were, the necessities of life required that they should buy and sell, and equally so that their trading should be unrestricted.*"

And in the *United States v. Grossmayer*, 9 Ib., 72, the same judge says:

We are not disposed to deny the doctrine that a resident in the territory of one of the belligerents may have, in time of war, an agent residing in the territory of the other, to whom his debtor could pay his debt in money, or deliver to him property in discharge of it; but in such a case, the agency must have been created *before the war began*, for there is no power to appoint an agent for any purpose after hostilities have commenced; and to this effect are all the authorities.

Now, in the case at bar, the parties all residing in a State in insurrection, according to the case first cited, were left entirely unrestricted in their right to trade. The agent was sent into the interior of the State, primarily to collect debts, by the purchase, in payment of such indebtedness, of the products of the country, and in order to facilitate such collections, he was furnished with funds. It is shown

that the cotton was bought in small lots, and from the well-known mode of dealing in the South, by which merchants advance to planters on their crops, it is a fair inference that the cotton was thus received in payment of debts due, the agent paying any difference between the amount of the indebtedness and the value of the crops. The funds were sent for the purpose of carrying out the primary object of the agent's business, and the whole transaction was a strictly commercial business—an attempt to close up a mode of dealing which existed prior to the commencement of hostilities.

So, as between the principals and the agent, the agency was *created before the war began*, that is to say, before the territory of Louisiana was divided by the lines of the Union army. If the principals had been in the interior of the State, where the agent then was, when New Orleans was captured, they could themselves legally have bought the cotton, and the agent being there, in violation of no law, and having had no illegal intercourse with them, was in no way disqualified from making the purchases for them. The agent and the property both were within the rebel lines until after the purchase, and both remained there until the Union forces penetrated the interior of the State, and thus brought the parties into lawful relations with each other. Thus the case is clearly within the principles above quoted, which is recognized in the *Grossmayer* case.

The cases cited and relied upon by the Solicitor General are not analogous to the case at bar.

In *Grossmayer's case*, 9 Wallace, 72, the acts of the parties were clearly in violation of the non-intercourse act. Einstein, the debtor, was a resident of Georgia, while Grossmayer resided in the State of New York, and the communication between them, through a third person, not only took place after the commencement of hostilities, but was carried on in violation of the rules of war, by passing through the lines of the hostile forces. Here Ein-

stein constituted himself the agent of his creditor, with whom he was at war, in the purchase of the cotton, and to make the matter worse carried on a correspondence clandestinely with that enemy. And this difference in the facts makes the cases as unlike as possible.

In the case of *Montgomery v. The United States*, 15 Wallace, 395, there was an attempt to sell property, Montgomery, the purchaser, and the factor of the owner, being within the Union lines, while the owner and the property itself were both within Confederate territory. It does not appear in the case when the factor was authorized to sell, if, indeed, he was authorized at all—whether before or after the commencement of hostilities, though the Solicitor General assumes, in his brief, that the agency existed prior to the war. The sale was incomplete, as the contract expressly stipulated that the greater portion of the purchase money was to be paid when the weight and quantity of the sugar, molasses, and rum were ascertained after their delivery in New Orleans, within the Union lines. The contract evidently contemplated communication with parties within the rebel lines, in order to obtain possession of the property and its transportation to New Orleans, and there is nothing in the case to show that the owner of the property, in fact, had any knowledge of the transaction, or ever assented to it. The contract, whether considered as executory or as executed, was held to be illegal and void, and a clear case of trading with a public enemy.

In his brief, the Solicitor General says: "*Nothing* seems to have turned upon the *situs* of the property," and adds, that if the owner had himself been in New Orleans, where the pretended sale took place, and conducted the sale in person, or being there, the transaction had occurred as detailed in the case, the sale would have been valid. The Solicitor General is clearly mistaken in supposing that the *situs* of the property had no influence upon the decision rendered, for the property is spoken of as being within the

enemy's lines, while the owner was also there, and this appears to me to be the main ground of the opinion. The date of the authority of the factor or agent to make the sale, not having been made apparent, the Court could only infer that it arose after the war, and if so, the agent being within, and the owner without, the Union lines, the power conferred was clearly illegal.

It will thus be seen that the two cases relied upon by the appellant, are widely different from the case at bar. In the first case, the agency was created after the commencement of the war, and in clear violation of the non-intercourse act; and in the other, the right of the agent to act, was not only questionable, but at the time of the pretended sale, both the owner and the property were in the hostile territory. In the case at bar, the principals, the agent and the property and its owners, were all lawfully within the territory controlled by the rebel forces. They possessed the unrestricted right to trade. When the agent was appointed, there was no legal obstacle in the way. He was sent out to close up commercial transactions, and to receive payment in money or property. By the action of the military forces, he is cut off from his principals, an event not contemplated when he left New Orleans. By this action of the army, the agent and his principals are placed in an attitude of hostility, and they hold no intercourse. And thus the very case arises which is recognized by Justice Strong, in Montgomery's case, when he says: "A resident in the territory of one belligerent may have in times of war, an agent residing in the territory of the other belligerent, to whom his debtor may pay the debt, or deliver property in discharge of it. Such payments or deliveries involve no intercourse between enemies."

The record in this case shows, that the appellees—the one as a citizen, the other as a domiciled alien—faithfully and conscientiously adhered to the United States throughout the rebellion, and it is a question worthy of consideration

whether such persons shall be deprived of their property, or its proceeds, under the harsh rule contended for by the appellant, where no moral turpitude or intentional wrong is shown, while persons who were notoriously disloyal throughout the war, are now receiving the net proceeds of their property seized under similar circumstances.

Respectfully submitted,

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Attorney for Appellees.

17-601

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

THE UNITED STATES, APPELLANTS,
v.
JULES LAPÈNE AND AUGUSTE FERRE. } No. 96.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

THE UNITED STATES, APPELLANTS,
v.
JULES LAPÈNE AND AUGUSTE FERRE. } No. 96.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

The claimants, being partners in trade and residents of New Orleans, in March or April, 1862 requested one Avegno, then there, but about to go to certain parishes in the interior of Louisiana, to furnish a traveling clerk of theirs, (at that time within said parishes making collections and acting as their agent to buy cotton, &c.,) with four or five thousand dollars to assist him in buying cotton. At the time of such arrangement, New Orleans and the said parishes were within the Confederate lines.

Avegno went to the parishes before New Orleans was captured, did as requested by the claimants, and the cotton, the proceeds of which were claimed here, was purchased, *after such capture*, partly with money collected as above, and partly with means furnished by Avegno. In 1863 the cotton was captured, and afterwards its proceeds went into the Treasury.

From these facts, the Court of Claims concluded that such cotton was not purchased in violation of any law

relating to commercial intercourse between inhabitants of loyal and insurrectionary States. Accordingly, judgment was given for the claimants.

On behalf of the United States, we assign for error,—the conclusion of law that such commercial intercourse was not illegal.

After the capture of New Orleans, its inhabitants became, in law, enemies of the inhabitants of the parishes beyond the military lines of the United States. If, in point of fact, an instance of commercial intercourse occurred between these parties, respectively, the court will mark it as an instance of unfaithfulness to paramount public interests, and refuse to enforce any relation supposed to arise therefrom.

To this general rule there is an exception, which is supposed by the court below to cover the case here: It is said that commercial business may be transacted between a citizen and a resident agent of a non-resident alien enemy, provided, that such agent were appointed before the beginning of the war. We submit that, upon principle as well as *authority*, this exception is limited to the winding up of commercial relations antedating the war, and does not cover cases of a general running commercial business ~~that was~~ begun before the war.

Upon *principle* there seems to be no difference (in the presence of the laws of war) between one sort of agency for transacting a running commercial business within an enemy's country, and another; that, for instance, the fact that such agent is unpaid, or that he is paid in one way or in another, constitutes no such difference. One sort of agency is ~~that of~~ partnership. It is clear that ~~the~~ connection of this sort between citizens of different countries is dissolved by the breaking out of war between such countries.

The leading American case upon this general question, (Griswold *v.* Waddington, 15 Johns., 57, and 16 Johns., 438,) decided that point upon principles which apply to running commercial transactions under any

sort of agency; which principles, however, do not prevent the winding up of a partnership, or the continuance of an agency limited to the settlement of existing relations.

Authorities impose a similar restriction upon this exception.

In *Grossmayer's* case, (9 Wallace, 72,) which was one of an appointment of an agent to receive a debt, *made after the war began*, this court said, with caution, "we are not disposed to deny the doctrine that a resident in the territory of one of the belligerents may have in time of war an agent residing in the territory of the other, *to whom his debtor could* pay *his debt in money*, or *deliver to him property* in discharge of it."

In *Montgomery's* case, (15 Wallace, 395,) one *Burbridge*, residing in New Orleans after its capture, as agent (created before the war) of Johnson, then within the *enemies' lines*, sold to *Montgomery*, also resident at New Orleans, a large quantity of sugar, etc., at that time in Johnson's hands. This sale was held to be void, the court laying down the exception to the general rule in the words previously used in *Grossmayer's* case, given above.

We submit that Montgomery's case is in point here, as well for the principle of the decision as for the terms in which the exception to the rule is laid down.

The vice in the plaintiff's title there was in the link which connected Burbridge and Johnson, the court holding that the pretended agent was not such really. *Nothing* seems to have turned upon the *situs* of the property. It seems that if Johnson had himself been in New Orleans and conducted the sale in person, or being there the transaction had occurred as detailed in the case, the sale would have been valid.

The present is the same case, except that here the transaction was in the enemies' country, and the link relied upon connected a resident purchaser, ~~with a~~ non-resident-alien-enemy-agent, of a vendor, likewise a non-resident alien enemy.

In Montgomery's case the court say, "very clearly, in effect, the parties to the transaction were the appellant,

and *a public enemy*. For this reason the judgment (dismissing the claim) is affirmed." This language seems strictly applicable to the present case.

That the *collecting* part of the clerk's business continued to be legitimate after the capture, is of no consequence, as the whole transaction *of purchase* is contaminated by that part of it which was illegal.

G. H. WILLIAMS,
Attorney-General.
S. F. PHILLIPS,
Solicitor-General.

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